# 89-1340

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

**MARGOT M. WASHBURN, as Administrator with Will Annexed of the Estate of Elizabeth Whitman Rounthwaite,**

*Petitioner,*

*vs.*

**JANE SHEEDY, Individually and as Trustee under the Will of Helen Louise Greaves,**

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

---

## PETITION FOR WRIT OF CERTIORARI

---

LAURENCE L. PILLSBURY
*Counsel of Record*

LAURENCE L. PILLSBURY, INC.

Suite C
7730 Herschel Avenue
La Jolla, California 92037
(619) 459-4109

*Attorney for Petitioner*

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

56P

## QUESTION PRESENTED

The statutes of California and most other states authorize persons interested in probate matters to request notice of further proceedings and require that notices thereafter be given as requested. The question is: When a state court construes a will in ordering distribution of a probate estate, as here, does the Due Process Clause of the Fourteenth Amendment require notice by mail to those persons affected by the order, notwithstanding that they were given notice of the probate commencement and failed to request notice of further proceedings as permitted by these statutes?

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

California Probate Procedure ..... 4

The Probate of Greaves' Will ..... 7

The Greaves Will ..... 9

The Decree of Distribution ..... 9

Events After Distribution ..... 10

The Current Proceeding ..... 10

REASONS FOR GRANTING THE WRIT ..... 12

The Writ Should Issue to Secure Compliance With This Court's Decisions and/or Resolve Important Questions Regarding Due Process in Probate Proceedings ..... 12

CONCLUSION ..... 19

Page

## INDEX TO APPENDICES

APPENDIX A
OPINION, COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, FILED AUGUST 25, 1989 ..... A-1

APPENDIX B
MODIFICATION OF OPINION, COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, FILED SEPTEMBER 15, 1989 ..... B-1

APPENDIX C
ORDER DENYING PETITION FOR REHEARING, COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, FILED SEPTEMBER 15, 1989 ..... C-1

APPENDIX D
ORDER DENYING REVIEW, CALIFORNIA SUPREME COURT, FILED NOVEMBER 21, 1989 ..... D-1

APPENDIX E
ORDER, RIVERSIDE COUNTY SUPERIOR COURT, FILED JULY 29, 1988..... E-1

APPENDIX F
STATUTORY PROVISIONS — THE CONSTITUTIONALITY OF WHICH MAY BE CALLED INTO QUESTION ..... F-1

## TABLE OF AUTHORITIES

**Page**

### Cases

American Railway Express Company v. Levee
296 U.S. 19 (1923) . . . . . .2

Burnett v. King
33 Cal.2d 805 (1949) . . . . . .16

Davis Oil Co. v. Mills
873 F.2d 774 (5th Cir. 1989), *cert. denied*,
107 L.Ed. 321, 110 S.Ct. 331 . . . . . .16

Estate of Dell
196 Cal.App.2d 809,
17 Cal.Rptr. 46 (1961) . . . . . .17

Estate of Loring
29 Cal.2d 423, 175 P.2d 524 (1946) . . . . . .17

Estate of MacLean
47 Wis.2d 396, 177 N.W.2d 874 (1970) . . . . . .13

Estate of McDonald
260 Cal.App.2d 407,
67 Cal.Rptr. 227 (1968) . . . . . .17

Federal Farm Mtg. Corp. v. Sandberg
35 Cal.2d 1, 215 P.2d 721 (1950) . . . . . .17

Larrabee v. Tracy
21 Cal.2d 645, 134 P.2d 265 (1943) . . . . . .14

Mennonite Bd. of Missions v. Adams
462 U.S. 791 (1983) . . . . . 11, 13, 14, 16, 18

**Page**

Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306 (1950) . . . . . 11, 13, 16-18

Schaffer v. American Trust Co.
164 Cal.App.2d 653,
331 P.2d 188 (1958) . . . . . 17

Southern Pacific Transportation Co. v. State Bd. of Equalization
191 Cal.App.3d 938,
237 Cal.Rptr. 191 (1987). . . . . 13

Stevens v. Torregano
192 Cal.App.2d 105,
13 Cal.Rptr. 604 (1961) . . . . . 17

Tulsa Professional Collection Services, Inc. v. Pope
445 U.S. 478 (1988) . . . . . 12, 18

**Federal Statutes**

28 U.S.C. § 1257(3) . . . . . 2
28 U.S.C. § 2403(b) . . . . . 3

**State Statutes**

California Code of Civil Procedure
Section 412.20 . . . . . 15

**Page**

California Probate Code
§§ 33, 34, added Cal. Stats. 1983, ch. 842, § 21 . . . . . .7

Cal. Prob. Code § 1208, added Cal. Stats. 1987, ch. 923, § 60. . . . . .7

Cal. Prob. Code § 8100, added Cal. Stats. 1988, ch. 1199, § 81.5. . . . . .5

Former Cal. Prob. Code, § 323, added Cal. Stats. 1931, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8000 with immaterial modifications . . . . . .4

Former Cal. Prob. Code, § 326, added 1931, as amended Cal. Stats. 1963, ch. 69, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8002 with immaterial modifications . . . . . .4

Former Cal. Prob. Code § 327, added Cal. Stats. 1931, as amended Cal. Stats. 1957, ch. 1671, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8003 with immaterial modifications . . . . . .4

Former Cal. Prob. Code, § 328, added 1931, as amended Cal. Stats. 1970, ch. 1014, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8110 with immaterial modifications . . . . . .4

Former Cal. Prob. Code § 441, as amended Cal. Stats. 1979, ch. 731, § 10, repealed Cal. Stats. 1988, ch. 1199, § 45 . . . . . .5

**Page**

Former Cal. Prob. Code § 1020, added 1931, as amended Cal. Stats. 1933, ch. 969, § 11, repealed Cal. Stats. 1988, ch. 1199, § 55.5 . . . .2, 6

Former Cal. Prob. Code § 1020, as amended Cal. Stats. 1980, ch. 955, § 24, repealed Cal. Stats. 1988, ch. 1199, § 55.5, now § 11601. . . . . .7

Former Cal. Prob. Code § 1027, added Cal. Stats. 1933, ch. 908, § 1, as amended Cal. Stats. 1974, ch. 701, § 3, repealed Cal. Stats. 1988, ch. 1199, § 55.5 . . . . . .2, 6

Former Cal. Prob. Code, § 1200, as amended Cal. Stats. 1955, ch. 1133, § 9, repealed Cal. Stats. 1987, ch. 923, § 59, now § 1220 with material changes . . . . . .2, 6

Former Cal. Prob. Code, § 1200.1, added Cal. Stats. 1955, as amended Cal. Stats. 1957, ch. 208, § 1, repealed Cal. Stats. 1987, ch. 923, § 59. . . . . .5

Former Cal. Prob. Code § 1202, as amended Cal. Stats. 1967, ch. 381, § 1, repealed Cal. Stats. 1987, ch. 923, § 59, comparable provisions now appear as §§ 1250, 1252 . . . . . .5

Uniform Probate Code § 3-204. . . . . .16

Page

**Rules**

California Rules of Court
Rule 29.4(c) . . . . . 3
Rule 982(a)(9) (Rev. 1984) . . . . . 15

Federal Rules of Civil Procedure
Rule 54(c) . . . . . 16

**United States Constitution**

Fourteenth Amendment. . . . . 2, 3, 10, 12, 19

**Publications**

1 Cal. Decedent Estate Practice
(Cont.Ed.Bar 1986) § 6.12 . . . . . 18

Comment, Notice Requirements in California
Probate Proceedings
66 Cal. L. Rev. 1111 (1978) . . . . . 17

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

**MARGOT M. WASHBURN, as Administrator with Will Annexed of the Estate of Elizabeth Whitman Rounthwaite,**

*Petitioner,*

*vs.*

**JANE SHEEDY, Individually and as Trustee under the Will of Helen Louise Greaves,**

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

---

Petitioner, Margot M. Washburn, as Administrator with Will Annexed of the Estate of Elizabeth Whitman Rounthwaite, deceased, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, entered, August 25, 1989, modified, September 15, 1989.

## OPINIONS BELOW

The opinion and orders relevant here were not reported. The Opinion of the Court of Appeal of the State of California is reprinted as Appendix "A," the Modification of Opinion as Appendix "B," the order denying rehearing as Appendix "C," the order of the Supreme Court of California denying review as Appendix "D," and the trial court's order denying Washburn relief as Appendix "E."

## JURISDICTION

Petitioner seeks review of a judgment of the Court of Appeal of the State of California entered on August 25, 1989. The Court of Appeal denied a timely petition for rehearing and concurrently modified its opinion on September 15, 1989. The Supreme Court of California, on November 21, 1989, denied a timely petition for review. The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. § 1257(3). The 90-day period for filing this petition began to run on November 21, 1989, when the Supreme Court of California denied review. *American Railway Express Company v. Levee*, 296 U.S. 19 (1923).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." The constitutionality of former California Probate Code Sections

1020, 1027, and 1200, which governed notice on a petition for final distribution of a probate estate when the events in question occurred, may be called into question within the meaning of Rule 29.4(c), and 28 U.S.C. § 2403(b) may apply. These provisions are quoted in Appendix "F."

## STATEMENT OF THE CASE

This case arises from California probate proceedings in the Estate of Helen Greaves. Greaves died on January 9, 1972, a resident of Palm Springs, California, leaving no issue, parents, or siblings. She bequeathed to her first cousin Elizabeth Rounthwaite a remainder in a trust to be established under her will. Rounthwaite died before the remainder fell in. Petitioner, Margot Washburn, is the administrator of Rounthwaite's estate. Washburn contends the trust remainder was indefeasibly vested at Rounthwaite's death. Respondent, Jane Sheedy, a first cousin once removed, is the residuary beneficiary of Greaves' will, the past executor of her estate, and now the trustee established by Greaves' will. Sheedy contends the decree establishing the Greaves' trust provides that Rounthwaite's remainder was contingent on surviving the life tenant and that Sheedy was entitled to the remainder if that condition failed. She further contends the doctrine of res judicata forbids Rounthwaite, and petitioner as her successor in interest, from looking behind that decree. The courts below have accepted Sheedy's argument. The decree establishing the Greaves trust was made without notice to Rounthwaite. The issue here is whether the procedure which led to that decree satisfied the Due Process Clause of the Fourteenth Amendment.

## California Probate Procedure

The California Probate Code provides that the executor named in a will, or any other interested person, may petition the Superior Court to prove a decedent's will.[1] The code requires the petition to state the names and addresses of the decedent's heirs, devisees, and legatees so far as known to the petitioner.[2] The code requires the clerk of the court to set the petition for hearing and give notice of the hearing by publication in a local newspaper.[3] The code also requires that this notice be served personally or by mail on the decedent's heirs, devisees, and legatees.[4]

California law authorizes interested persons to file requests for notice of later proceedings, and notice

---

[1] Former Cal. Prob. Code, § 323, added Cal. Stats. 1931, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8000 with immaterial modifications. The California Probate Code has been extensively amended and reorganized since Greaves' estate was administered. Citations are given first to the provisions in force during that administration, 1972 through 1975, followed by references to the comparable provision of the current code.

[2] Former Cal. Prob. Code, § 326, added 1931, as amended Cal. Stats. 1963, ch. 69, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8002 with immaterial modifications.

[3] Former Cal. Prob. Code § 327, added Cal. Stats. 1931, as amended Cal. Stats. 1957, ch. 1671, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8003 with immaterial modifications.

[4] Former Cal. Prob. Code, § 328, added 1931, as amended Cal. Stats. 1970, ch. 1014, § 1, repealed Cal. Stats. 1988, ch. 1199, § 40, now § 8110 with immaterial modifications.

thereafter is required in accordance with such requests.[5] At the time Greaves' estate was administered, California law did not require that any notice be given of the right of interested persons to request notice of further proceedings.[6] That was later changed,[7] but even today California law does not require notice that further proceedings may be taken without notice absent a request for such notice.[8]

When an estate is ready for closing, the code requires the executor to petition for an order distributing the

---

[5] "At any time after the issuance of letters testamentary or of administration, any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under trust, or as otherwise interested, or the State Controller, may, in person or by attorney, serve upon the executor or administrator or trustee, or upon the attorney for such executor, administrator, or trustee, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request, stating he desires special notice of the filing of any or all of the petitions, accounts or reports mentioned in Section 1200 of this code, and giving the post office address of the person making the same, or his attorney. Thereafter such person shall be entitled to notice as provided in Section 1200." Former Cal. Prob. Code § 1202, as amended Cal. Stats. 1967, ch. 381, § 1, repealed Cal. Stats. 1987, ch. 923, § 59, comparable provisions now appear as §§ 1250, 1252.

[6] See former Cal. Prob. Code, § 1200.1, added Cal. Stats. 1955, as amended Cal. Stats. 1957, ch. 208, § 1, repealed Cal. Stats. 1987, ch. 923, § 59.

[7] See former Cal. Prob. Code, 441, added 1931, as amended Cal. Stats. 1979, ch. 731, § 10, repealed Cal. Stats. 1988, ch. 1199, § 45.

[8] See Cal. Prob. Code § 8100, added Cal. Stats. 1988, ch. 1199, § 81.5.

residue of the estate to those entitled thereto.[9] At the time Greaves' estate was distributed, California law did not require the executor to give notice of the hearing on that petition to any devisee or legatee who had not appeared or requested special notice.[10] Five years later, the code was amended to require that notice of hearing on a petition to distribute be given to each "heir, legatee,

---

[9] "Immediately upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, devisee or legatee, or his assignee, grantee or successor in interest, and after notice given for the period and in the manner required by section 1200 of this code, the court must proceed to distribute the residue of the estate among the persons entitled thereto. Any person interested in the estate or any coexecutor or coadministrator may resist the application." Former Cal. Prob. Code § 1020, added 1931, as amended Cal. Stats. 1933, ch. 969, § 11, repealed Cal. Stats. 1988, ch. 1199, § 55.5. "Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of filing a final account. Notice of such application must be given in the manner provided in Section 1200 of the Probate Code." Former Cal. Prob. Code § 1027, added Cal. Stats. 1933, ch. 908, § 1, as amended Cal. Stats. 1974, ch. 701, § 3, repealed Cal. Stats. 1988, ch. 1199, § 55.5.

[10] Former California Probate Code sections 1020 and 1027, quoted *supra*, fn. 9, provided that notice on a petition for distribution be given in accordance with former section 1200, which provided: "At least 10 days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account . . . must cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at . . . ." Former Cal. Prob. Code, § 1200, as amended Cal. Stats. 1955, ch. 1133, § 9, repealed Cal. Stats. 1987, ch. 923, § 59, now § 1220 with material changes.

or devisee whose interest is affected by the petition."[11] Even the amended provision would not require notice of final distribution to Rounthwaite because the code expressly provides that trust beneficiaries and remaindermen are not "devisees" or "legatees."[12]

**The Probate of Greaves' Will**

After Greaves' death, Sheedy promptly petitioned the Superior Court of the State of California for the County of Riverside to prove Greaves' will and obtain letters testamentary. Sheedy mailed a notice of hearing on this petition to Rounthwaite. That notice, entitled "NOTICE OF HEARING ON PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY," given under the case caption, provided:

> NOTICE IS HEREBY GIVEN That JANE SHEEDY has filed herein a Petition for Probate of Will and For Letters Testamentary reference to which is made for further particulars, and that the time and place for hearing same has been set for . . . [date, time, and place omitted]. (C.T. 8.)

Neither this notice nor any other notice advised Rounthwaite that she could file a request for notice of further proceedings. And neither this notice nor any

---

[11] Former Cal. Prob. Code § 1020, as amended Cal. Stats. 1980, ch. 955, § 24, repealed Cal. Stats. 1988, ch. 1199, § 55.5, now § 11601.

[12] See Cal. Prob. Code §§ 33, 34, added Cal. Stats. 1983, ch. 842, § 21; see also Cal. Prob. Code § 1208, added Cal. Stats. 1987, ch. 923, § 60.

other notice advised Rounthwaite that additional proceedings might be conducted without further notice.

The court admitted Greaves' will to probate and appointed Sheedy executor on February 18, 1972. Ten months later, Sheedy petitioned for a partial allowance on the commissions of the executor and her attorney. Notice of hearing on this petition was mailed to Rounthwaite.[13] This was the second and last notice given to Rounthwaite before the decree of distribution became final.

Two and one-half years after probate commencement, Sheedy filed her first and final account and petition for distribution. No notice of filing or hearing on this petition was given to Rounthwaite. (C.T. 164-165.) Neither the caption nor the prayer suggested Sheedy was seeking a construction of the will. (C.T. 166, 183-184.) Included in this 35 page document, however, were allegations that Rounthwaite's remainder was contingent on surviving the life tenant and that Sheedy was an alternative contingent remainderman. (C.T. 172, 174.)

---

[13] The Court of Appeal Opinion twice refers to notice given to Rounthwaite of a petition for payment of commissions. This was the petition for partial allowance filed in December 1972, some two years before the petition for final distribution. The notice of hearing for this petition, mailed December 21, 1972, with the title "NOTICE OF HEARING" given under the case caption, provided: "Notice is hereby given that Jane Sheedy, Executrix of the Estate of Helen Louise Greaves, deceased, has filed herein a Supplement to Petition for Allowance Upon Statutory Executrix's Commission and Attorney Fees, reference to which is made for further particulars, and that the time and place of hearing the same has been continued to . . . [date, time, and place omitted]. (C.T. 98.)

## The Greaves Will

Greaves' will left all of her stocks and bonds in trust and directed that the income be paid to her friend, Lillian Thomure, for life. As originally executed, the will left the trust remainder to "Margaret Whitman Sheedy, Elizabeth Whitman Rounthwaite, and Gertrude Whitman Condee, share and share alike." Before death, Greaves struck the names of Margaret Sheedy and Gertrude Condee, leaving Rounthwaite as the only named remainderman. Following the gift of the remainder, the will provided:

> In the event that any of the foregoing beneficiaries shall predecease me or shall not survive distribution to him or her of any part of my estate, leaving no issue surviving my death, then and in that event his or her share shall go to augment the share of the survivors of them and surviving distribution to him or her.

Washburn contends this clause required Rounthwaite to survive only until the distribution of Greaves' probate estate, a condition satisfied.

## The Decree of Distribution

On November 25, 1974, the court took Sheedy's petition for distribution under submission. (C.T. 203.) By minute order three weeks later, the court approved the accounting, fixed extraordinary fees, granted the petition for distribution, and directed Sheedy's counsel to prepare a formal order. That minute order made no comment on the meaning of the will. (C.T. 204.) On

March 31, 1975, the court signed the formal order. (C.T. 206-217.) The order included a finding that all the allegations of the petition were true. No notice of the order or its entry were mailed to Rounthwaite. (C.T. 217, 218.)

**Events After Distribution**

Elizabeth Rounthwaite died December 14, 1985, without issue surviving her death or the death of Greaves. The life tenant died on February 28, 1989, while this matter was pending in the Court of Appeal. Thus, Rounthwaite survived the distribution of Greaves' probate estate by more than ten years, but did not survive the life tenant.

**The Current Proceeding**

On March 25, 1988, after being appointed administrator of Rounthwaite's estate, Washburn petitioned the court administering Greaves' trust for an order determining entitlement to the trust remainder. The petition alleged that Greaves' will, properly construed, granted Rounthwaite a remainder that was indefeasibly vested at Rounthwaite's death. The petition further alleged that Sheedy should be estopped from relying on the decree of distribution because notice of the petition to distribute was not given to Rounthwaite and such omission violated the executor's fiduciary duty and the Due Process Clause of the Fourteenth Amendment. (C.T. 223.) The petition was decided on the written record, including the verified petition, declarations, briefs, and stipulated facts.

The trial court denied relief. It held that the decree of distribution was binding, that it unambiguously required Rounthwaite to survive the life tenant, and that any construction of the will was foreclosed by that decree. The estoppel and due process considerations were not discussed.

On appeal, Washburn reasserted the same contentions. The Court of Appeal affirmed, holding that the decree incorporated by reference the allegations in the petition that Rounthwaite's remainder was contingent on surviving the life tenant. The court expressly rejected the estoppel and due process arguments, holding that the executor had no fiduciary or constitutional duty to give notice of the petition for final distribution in the absence of Rounthwaite's request for such notice. The court distinguished on their facts this Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). The court said:

> Unlike the situation in *Mennonite*, Rounthwaite was adequately informed of the pending proceedings. In this situation, Rounthwaite had the ability and duty to become informed and protect her interests. (*Federal Farm Mtg Corp. v. Sandberg* (1950) 35 Cal.2d 1, 5.)
>
> Both *Mennonite* and *Mullane* involved notice by publication or other means not involving personal notice, unlike the present case. The parties have not cited, nor has our research revealed a case discussing due process aspects where a party received personal notice of the proceedings but

> not notice of a particular hearing in that proceeding. Since she did receive personal notice and had the ability to protect her interests, Rounthwaite received adequate notice to satisfy due process. (Opin., p. 10.)

## REASONS FOR GRANTING THE WRIT

### The Writ Should Issue to Secure Compliance With This Court's Decisions and/or Resolve Important Questions Regarding Due Process in Probate Proceedings

Without doubt, this case involves state *action*[14] and *property*[15] within the meaning of the Due Process Clause of the Fourteenth Amendment. The question here is whether California satisfied its obligation under that provision to give Rounthwaite notice of the hearing at which it construed Greaves' will. The only notices which could possibly satisfy that obligation were the two notices given during the first ten months of the proceeding.

---

[14] *Tulsa Professional Collection Services, Inc. v. Pope*, 445 U.S. 478 (1988).

[15] The most recent trust accounting showed assets with a fair market value of $479,000. If Rounthwaite was indefeasibly vested at her death with the trust remainder, as Washburn contends, those assets are now distributable to Rounthwaite's estate. A claim to such property is "property" within the meaning of the Due Process Clause. *Tulsa Professional Collection Services, Inc. v. Pope, supra*, at 484.

The requirement that notice must be meaningful hardly requires citation of authority.[16] The notices here sufficiently informed Rounthwaite that a probate was pending. The court below, however, assigned those notices another function. To sustain the decision, those notices must serve as meaningful notice of the hearing on the petition to construe the will. Since the notices said nothing about that dispute and nothing about the date for its resolution, they could not possibly provide due process with respect to that hearing.

The real question here is whether the State of California and Sheedy should somehow be relieved of their due process obligation simply because Rounthwaite did not request notice. The decision below turns on the conclusion that Rounthwaite "had the ability and duty to become informed and protect her interests." App. A, p. 10. This argument hardly becomes the State when only a few lines on its prescribed form were required to notify

---

[16] *Mullane* said "The notice must be of such nature as reasonably to convey the required information . . . ." 339 U.S. at 314. *Mennonite* said "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter 'was the information which [the county] was constitutionally obliged . . . to give . . .' " 462 U.S. at 793. By analogy, Rounthwaite's knowledge that a probate was pending was not the equivalent of notice that a hearing was set to adjudicate the meaning of the will. The latter was the information which Sheedy and California were constitutionally obliged to give. In *Estate of MacLean*, 47 Wis.2d 396, 177 N.W.2d 874, 877-78 (1970), the Wisconsin Supreme Court, relying on *Mullane*, held that notice of a petition to distribute a probate estate was not notice that the will would be construed. In *Southern Pacific Transportation Co. v. State Bd. of Equalization*, 191 Cal.App.3d 938, 950-51, fn. 12, 237 Cal.Rptr. 191 (1987), the court said the notice must provide the information required for the recipient to effectively exercise its rights.

the recipient of the right to request notice and the consequences of failing to exercise that right. And the argument is no more becoming to Sheedy who was both an officer of the court and a fiduciary obligated to act with the highest good faith.[17] In any case, this Court considered a comparable issue in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). In holding unconstitutional an Indiana procedure for foreclosing property tax liens, this Court specifically rejected the argument that notice by mail may be omitted when the person affected has the ability to protect his own interest. The Court said:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have been paid and whether tax-sale proceedings are therefore likely to be initialed. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, *a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty*

---

17 *Larrabee v. Tracy*, 21 Cal.2d 645, 650, 134 P.2d 265 (1943).

> *or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.* Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [county] was constitutionally obliged . . . to give personally to the appellant — an obligation which the mailing of a single letter would have discharged." *Schroeder v. New York City*, 371 U.S. at 214. (462 U.S. at 799-800, emphasis added.)

The decision below presumably would be sustainable if the process served were sufficient to establish a default. The notice here, though, has none of the trappings required for that function. The notice said nothing about an appearance being necessary or adviseable. It said nothing about a right to request special notice and nothing about the possibility of future proceedings without notice. Accordingly, any effort to sustain the decree by analogy to a default judgment in ordinary civil proceedings appears wholly inappropriate.[18] Any effort

---

[18] In contrast to the disarming notice given Rounthwaite, California Code of Civil Procedure section 412.20 requires the summons in an ordinary civil action to advise the defendant that unless he responds within 30 days the plaintiff may apply "for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or other property, or other relief." The form adopted by the California Judicial Council makes it clear the action will be taken without further warning and adds this helpful advice: "You may want to call an attorney right away." California Rules of

(continued)

to sustain the decision with the doctrine of waiver appears equally inappropriate — a waiver of due process must be an informed one.[19]

The application of principles already established by this Court to the undisputed facts here may be sufficiently clear to warrant summary reversal. Due process simply is not and should not be limited to those who request it. On the other hand, the court below considered *Mullane* and *Mennonite* and did not find them compelling. Accordingly, self help and its legal consequences under the circumstances here may be sufficiently different to warrant consideration by this Court. A plenary hearing and definitive opinion may also be warranted, no matter how clear the result, simply because of a visceral reluctance in the provinces, apparent at least in California, to carry due process to the heart of the probate proceeding.

Most states have provisions comparable to the California statute authorizing interested persons to request notice of further proceedings. See, for example, Uniform Probate Code § 3-204. The states do not place wholesale reliance on these provisions. On the contrary, all codes define with some particularity the persons to whom notice must be given for various hearings. Nevertheless, whenever the code drafters for one reason or another overlook classes of interested persons, as here, or whenever executors or court clerks overlook particular individuals within those classes, the question

---

(ftn. continued)
Court, Rule 982(a)(9) (Rev. 1984). A default judgment, of course, may not differ in nature or exceed the amount demanded in a complaint. Fed. Rules of Civ. Proc., Rule 54(c); *Burnett v. King*, 33 Cal.2d 805, 808 (1949).

[19] *Davis Oil Co. v. Mills*, 873 F.2d 774 (5th Cir. 1989), *cert. denied*, 107 L.Ed. 321, 110 S.Ct. 331.

will arise: should the individuals who profit from these mistakes be permitted to climb into a convenient bunker on the ground someone failed to request special notice?

In 1978, some 28 years after *Mullane*, a review and analysis of California law regarding notice in probate proceedings was published in the California Law Review. The author concluded: *First*, the notice provisions of the California Probate Code which predated *Mullane* remainded largely intact. *Second*, those provisions probably did not comply with *Mullane* in several respects. *Third*, the deficiencies were tolerated because most California cases denied that *Mullane* applied to probate proceedings.[20]

The Supreme Court of California has not considered the constitutionality of California probate notices since *Mullane*. This unfortunately leaves at large earlier decisions of that court, including one relied on below, that posted notice of individual steps in the probate process together with the opportunity to request mailed notice is sufficient to bind all interested persons. *See Federal Farm Mtg. Corp. v. Sandberg*, 35 Cal.2d 1, 5, 215 P.2d 721 (1950); *Estate of Loring*, 29 Cal.2d 423, 428, 175 P.2d 524 (1946).[21]

---

[20] Comment, Notice Requirements in California Probate Proceedings, 66 Cal. L. Rev. 1111, 1111-14 (1978). For cases, apparently oblivious to *Mullane*, holding that probate orders were binding when the statutory commands were met, regardless of notice to interested parties, *see Estate of McDonald*, 260 Cal.App.2d 407, 412, 67 Cal.Rptr. 227 (1968); *Estate of Dell*, 196 Cal.App.2d 809, 812, 17 Cal.Rptr. 46 (1961); see also dicta in *Stevens v. Torregano*, 192 Cal.App.2d 105, 114, 13 Cal.Rptr. 604 (1961); *Schaffer v. American Trust Co.*, 164 Cal.App.2d 653, 331 P.2d 188 (1958).

[21] One California Court of Appeal decision in 1977 specifically applied *Mullane* in holding statutory notice insufficient for a probate order approving a long-term lease. In the course of denying review,

(continued)

Today, 40 years after *Mullane*, the following remarks appear in a widely used and respected probate manual (1 Cal. Decedent Estate Practice (Cont.Ed.Bar 1986) § 6.12):

> To meet the constitutional requirements of due process, only initial notice of the administration of the estate is required. *Estate of Bump* (1907) 152 C 274, 92 P 643; *William Hill Co. v. Lawler* (1897) 116 C 359, 48 P 323. But see *Mennonite Bd. of Missions v. Adams* (1983) 462 US 791 (published and posted notice did not afford adequate due process to readily ascertainable claimant) and *Continental Ins. Co. v. Mosely* (Nev 1984) 683 P2d 20 (more than service by publication was necessary to terminate rights of claimant of whom estate had actual knowledge). These decisions raise serious questions about the adequacy of notice given in California probate proceedings.

Is it true, as the authors assert, that constitutional due process applies only to the initial probate notice? Simply stating the proposition would seem to refute it, but that may be what the court below decided. And is it true that *Mennonite* and the other decisions of this court merely raise questions about adequacy? This manual has not been updated since this Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope, supra,*

---

(ftn. continued)
the California Supreme Court ordered the opinion not published in the official reports, thus eliminating it as citable authority. See 66 Cal. L. Rev., *supra* at 1115.

455 U.S. 478 (1988), which applied due process to the administration of the claims of decedent's creditors. It would be helpful if this Court took the next step into the heart of the probate proceeding. The court below observed "The parties have not cited, nor has our research revealed a case discussing due process aspects where a party received personal notice of the proceedings but not notice of a particular hearing in that proceeding." App. A, p. 10. A decision here would fill that void.

## CONCLUSION

Limiting due process to those who request it is a drastic curtailment of individual rights under the Fourteenth Amendment. That limitation together with the need for an authoritative decision extending due process to the heart of the probate proceeding deserve the attention of this Court. A plenary hearing or at least a summary reversal are warranted. The case should ultimately be remanded to the court below to consider the proper construction of Greaves' will.

Respectfully submitted,

LAURENCE L. PILLSBURY
*Counsel of Record*

LAURENCE L. PILLSBURY, INC.

*Attorney for Petitioner*

# APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

**FILED**
AUG 25 1989
Court of Appeal Fourth Dist.

Estate of HELEN LOUISE GREAVES,
Deceased.

MARGOT M. WASHBURN, etc.
Petitioner and Appellant,
v.
JANE SHEEDY, etc.,
Respondent.

E005898
(Super.Ct. Indio 3719)

**OPINION**

APPEAL from the Superior Court of Riverside County. Noah Ned Jamin and Frank Moore, Judges. Affirmed.

Laurence L. Pillsbury for Petitioner and Appellant.

Heinzelman & Schoenherr, and Russell J. Heinzelman for Respondent.

## FACTS AND PROCEDURAL HISTORY

Helen Louise Greaves died in 1972. Her will appointed Jane Sheedy as executrix. It provided, in pertinent part, "**SEVENTH:** I give, devise and bequeath to my cousin, JANE SHEEDY, all stocks and bonds of which I may die possessed, in trust, nevertheless, to and for the uses and purposes hereinafter specified, as follows, to-wit:

> "I direct my Trustee to pay to my friend, LILLIAN R. THOMURE, the interests and dividends arising from said stocks and bonds during the lifetime of said LILLIAN R. THOMURE.
>
> "This trust shall continue only until the death of my friend, LILLIAN R. THOMURE.
>
> "Upon the final termination of this trust, I give, devise and bequeath said trust property to my cousins, ~~MARGARET/WHITMAN/SHEEDY~~, ELIZABETH WHITMAN ROUNTHWAITE and ~~GERTRUDE/WHITMAN/CONDEE~~, share and share alike.
>
> "If any of the foregoing beneficiaries are entitled to any property under this will and any of them predecease me or shall not survive distribution to him or her, leaving issue surviving my death, the surviving issue of said deceased shall take the share that the parent would have taken had he or she lived. In the event that any of the foregoing beneficiaries shall predecease me or shall not survive distribution to him or her of any part of my estate, leaving no issue surviving my death, then and in that event his or her share shall go to

augment the share of the survivors of them and surviving distribution to him or her.

"I direct that JANE SHEEDY, or her alternate as hereafter provided shall not be required to furnish any bond as Trustee of this trust, and shall have the sole and exclusive custody and possession of all assets and property constituting the trust estate of this trust.

"**EIGHTH:** All the rest, residue and remainder of my estate, both real and personal, wherever situated, of which I may die seized and possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my cousin, JANE SHEEDY, to have and to hold as her sole and separate property. If the foregoing beneficiary is entitled to any property under this will and she predeceases me or fails to survive distribution to her, leaving issue surviving my death, the surviving issue of said deceased shall take the share that the parent would have taken had she lived. In the event the foregoing beneficiary predeceases me or fails to survive distribution to her, leaving no issue surviving my death, then and in that event her share shall become a portion of the residuary of my said estate."

Sheedy sent notice of the hearing on the petition for probate of the will to Elizabeth Rounthwaite, among others. Rounthwaite also received notice of Sheedy's petition for payment of executrix's commission and attorney's fees. The record does not reveal that Rounthwaite filed a request for special notice nor that she received notice of any other hearing.

In her final accounting and petition for distribution, Sheedy stated, "That by the terms and provisions . . . of decedent's will, ELIZABETH WHITMAN

ROUNTHWAITE is made the contingent remainderman and JANE SHEEDY is made the alternate contingent remainderman" of the trust. She then quoted the seventh and eighth paragraphs of the will. She further explained, "At the time of decedent's death, ELIZABETH WHITMAN ROUNTHWAITE had, and still has no issue. As a consequence, her gift of the remainder is subject to defeasance by her failure to survive the antecedent estate of LILLIAN R. THOMURE. Probate Code Sections 122, 141, and 142 apply and prevent vesting.

> "Since JANE SHEEDY must survive the life beneficiary and the contingent remainderman, JANE SHEEDY, is but an alternate contingent remainderman without any vested estate under the same Probate Code Sections cited in the preceding paragraph."

The court filed its order approving the final accounting and its decree of distribution on March 31, 1975. The court found that all the allegations of the petition were true. It further provided, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that JANE SHEEDY be and she is hereby appointed the Trustee for LILLIAN R. THOMURE, life beneficiary, and ELIZABETH WHITMAN ROUNTHWAITE, contingent remainderman, and JANE SHEEDY, alternate contingent remainderman, for the purpose of carrying out the terms of the trust provided for in the will . . . ." The decree then quoted paragraphs seven and eight of the will.

In 1988, Washburn filed a petition, as administrator of Rounthwaite's estate, to determine to whom the trust estate shall pass on the death of the income beneficiary. Lillian Thomure, the life beneficiary of the trust, was then still living. The petition alleged that Rounthwaite, who died in 1985, owned an indefeasibly vested remainder in the estate and that petitioner, as administrator of

Rounthwaite's estate, was entitled to possession of the entire trust estate on the death of Thomure.

The court found that the decree of distribution was conclusive and unambiguous and that Rounthwaite's interest was contingent on her survival of the term of the trust.

On appeal, Washburn contends that the court erred in finding the decree of distribution unambiguous and conclusive, that Sheedy's interest in the trust abated, that the decree of distribution was not binding on Washburn because Rounthwaite received inadequate notice, and that Sheedy should be estoppped from claiming the decree of distribution was resolved in her favor because of extrinsic fraud.

## DISCUSSION

## I

## DECREE OF DISTRIBUTION

Petitioner asserts several issues dealing with the conclusiveness of the decree of distribution and its interpretation with the aid of Greaves' will. "A decree of distribution is a judicial construction of the will arrived at by the court ascertaining the intent of the testator. [Citations.] Once final, the decree supersedes the will [citations] and becomes the conclusive determination of the validity, meaning and effect of the will, the trusts created therein and the rights of all parties thereunder. [Citations.] [¶] If the decree erroneously interprets the intention of the testator it must be attacked by appeal and not collaterally. [Citations.] If not corrected by appeal an 'erroneous decree . . . is as conclusive as a decree that contains no error.' [Citations.] It is well settled that 'where the decree of

distribution is contrary to the provisions in the will, the decree controls and prevails over the terms of the will with respect to the distribution of the property.' [Citations.] Only if the language of the decree is 'uncertain, vague or ambiguous' [citation] may resort be had to the will to interpret but not to contradict the decree. [Citations.] However, 'if the distributive portions of the decree are free from ambiguity, . . . resort may not be had to the provisions of the will . . .' in order to create an ambiguity. [Citations.]" (*Estate of Callnon* (1969) 70 Cal.2d 150, 156-157, fns. omitted.)

The decree of distribution is not vague or ambiguous. It lists Rounthwaite as a contingent remainderman and Sheedy as an alternate contingent remainderman. The judge below properly ascertained that the decree required the contingency of Rounthwaite's survival of the life tenant. Therefore, resort may not be had to the will to create an ambiguity concerning whether Rounthwaite's interest was indefeasibly vested.

## II

## ABATEMENT OF SHEEDY'S INTEREST

Washburn contends that if any interest passed to Sheedy as residuary beneficiary, it abated by her act of discharging debts and expenses of the estate from the sale of property left to her as trustee. Sheedy petitioned for authority to sell certain securities left to the trustee in order to pay debts and expenses of the estate. The court authorized this sale. The sale was necessary because the estate contained insufficient cash to meet these obligations and the residue of the estate was also insufficient. In the final accounting, Sheedy stated that, therefore, the residue should abate and its assets become part of the assets of the trust.

Washburn cites Probate Code sections 750 and 970 through 977 to illustrate what Sheedy should have done with the estate and trust property in this instance; however, she cites no authority or accompanying argument to explain why Sheedy's residuary interest in the trust should abate or why this is a reversible error pertinent to this appeal. Sheedy did not reply to this issue.

Absent argument or authorities to support Washburn's contention, we will not review this issue on appeal. (*Estate of Hunt* (1939) 33 Cal.App.2d 358, 361.) "We do not express ourselves . . . on the subject only because of any inconvenience or unnecessary labor to which we would be subjected if we undertook to do for litigants the duties which are theirs to perform. The problem is one of concern to all reviewing courts. Such extreme inadequacy of the briefs evidences a misconception of the respective duties of counsel and the courts. The reviewing courts have no time to spare. It can be fully occupied in the consideration of appeals that are properly presented in the briefs.

> "All courts need the competent and diligent assistance of counsel and are entitled to it. The fact that they too frequently do not receive it accounts for the greater part of time that is wasted in litigation. This is true at least in our own court. . . . [E]ach day we are required to spend in research and analysis of records, where counsel have failed to render the assistance which is due the court, means a day lost for every litigant who awaits decision of an appeal. It is in their interest, not merely for our own convenience, that we refuse to consider a claim . . . when there has been no pretense of compliance with the requirements of an

adequate presentation." (*Estate of Good* (1956) 146 Cal.App.2d 704, 706-707.)

## III

## NOTICE

Washburn concedes that Rounthwaite received the notice required under Probate Code sections 1020,[1] 1027[2] and 1200[3] at the time, but she argues that this

---

[1] "Immediately upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, devisee or legatee, or his assignee, grantee or successor in interest, and after notice given for the period and in the manner required by section 1200 of this code, the court must proceed to distribute the residue of the estate among the persons entitled thereto. Any person interested in the estate or any coexecutor or coadministrator may resist the application." (Prob. Code, § 1020, as it read from 1972-1975.)

[2] "Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of filing a final account. Notice of such application must be given in the manner provided in Section 1200 of the Probate Code." (Prob. Code, § 1027, as it read from 1972-1975.)

[3] "At least 10 days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account or desiring the confirmation of a report of appraisers, must cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post-office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such

(continued)

notice was inadequate to satisfy due process requirements. Rounthwaite received notice of the hearing on the petition for probate of Greaves' will and of the hearing on the petition for payment of Sheedy's commission and attorney fees, but the record does not reveal that she received notice of any other proceedings. Nor does the record indicate that she filed a request for special notice pursuant to Probate Court section 1202.[4]

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.]" (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 70 S.Ct. 652].) Rounthwaite received notice twice, at the initiation of the proceedings and another while they were ongoing. Washburn argues that due process required that notice be sent of all the hearings affecting Rounthwaite's rights under the will, including the hearing on the final accounting and distribution. Rounthwaite knew of the action and,

---

(ftn. continued)
person." (Pen. [*sic*] Code, § 1200, as it read from 1972-1975.)

[4] "At any time after the issuance of letters testamentary or of administration, any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under a trust, or as otherwise interested, or the State Controller, may, in person or by attorney, serve upon the executor or administrator or trustee, or upon the attorney for such executor, administrator, or trustee, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request, stating that he desires special notice of the filing of any or all of the petitions, accounts or reports mentioned in Section 1200 of this code, and giving the post office address of the person making the same, or his attorney. Thereafter such person shall be entitled to notice as provided in Section 1200." (Prob. Code, § 1202, as it read in 1975.)

statutorily, could take steps to protect her interests. However, a party's ability to take steps to protect her interests does not necessarily relieve one of the constitutional obligation of notice. (*Mennonite Bd. of Missions v. Adams* (1983) 462 U.S. 791, 799 [77 L.Ed.2d 180, 103 S.Ct. 2706].)

Unlike the situation in *Mennonite*, Rounthwaite was adequately informed of the pending proceedings. In this situation, Rounthwaite had the ability and duty to become informed and protect her interests. (*Federal Farm Mtge. Corp. v. Sandberg* (1950) 35 Cal.2d 1, 5.)

Both *Mennonite* and *Mullane* involved notice by publication or other means not involving personal notice, unlike the present case. The parties have not cited, nor has our research revealed a case discussing due process aspects where a party received personal notice of the proceedings but not notice of a particular hearing in that proceeding. Since she did receive personal notice and had the ability to protect her interests, Rounthwaite received adequate notice to satisfy due process.

## IV

## EXTRINSIC FRAUD

The decree of distribution is not subject to attack unless extrinsic fraud is shown. (*State of California v. Broderson* (1967) 247 Cal.App.2d 797, 803.) "Extrinsic fraud is present where . . . a decree is procured from the probate court by conduct which prevents those having an interest in the estate from appearing and asserting their rights. [Citations.]" (*Id.*, at p. 804.)

The court made no findings on this particular question; therefore, we presume that the findings support the judgment (*Minton v. Cavaney* (1961) 56 Cal.2d 576,

579, fn. 1) and determine whether there is substantial evidence to support that finding. (*Broderson, supra*, 247 Cal.App.2d at p. 803.)

First, Washburn argues that Sheedy committed extrinsic fraud in concealing the true nature of the proceedings. She asserts that buried in the final accounting was a petition to determine heirship, which required notice to Rounthwaite.[5] Washburn considers the assertion that Rounthwaite was a contingent remainderman and Sheedy an alternate contingent remainderman to the trust to be a petition for determination of heirship.

If Sheedy's act constituted fraud, it was intrinsic rather than extrinsic fraud. Intrinsic fraud does not entitle a petitioner to relief from a decree of distribution. (*Monk v. Morgan* (1920) 49 Cal.App. 154, 162.) The

---

[5] "Anytime after first publication of notice to creditors and prior to the time a petition for final distribution has been filed, the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. At least 10 days before the date set for the hearing of such petition by the court, the petitioner shall cause notice of the hearing thereof to be mailed to the executor or administrator and to all legatees and devisees and to all known heirs of the decedent, and to all persons (or their attorneys, if they have appeared by attorney) who have requested notice as provided in Section 1202 of this code, or who have given notice of appearance in person or by attorney, addressed to them at their respective post office addresses given in their requests for special notice or notice of appearance, if any, otherwise, at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such persons. Any person may appear and file a written statement setting forth his interest in the estate." [Prob. Code, § 1080, as it read from 1972-1975.)

court which examined the petition for distribution and final accounting could have discerned whether a petition for determination of heirship was concealed within the petition. The court had the duty to examine this document and approve it, and it knew the law concerning these petitions and notice. The court had the authority to require notice if it had felt it necessary. (Prob. Code, § 1204, as it read from 1972-1975.) Therefore, any fraud in concealing a petition for determination of heirship in the petition for distribution and resulting lack of notice was within the issues considered by the court when it approved that document. Therefore, it was intrinsic rather than extrinsic fraud. (*Carr v. Bank of America etc. Assn.* (1938) 11 Cal.2d 366, 373-374.)

It is extrinsic fraud if a party is deprived of an opportunity to be heard based on the breach of a fiduciary duty on the part of the prevailing party. (*Larrabee v. Tracy* (1943) 21 Cal.2d 645, 651.) A trustee has the fiduciary duty of highest good faith toward its beneficiaries (Civ. Code, § 2228 as it read in 1972-1975) and must inform the beneficiaries if it acquires any interest adverse to the interest of the beneficiaries. (Civ. Code, § 2233 in 1972-1975.) Washburn, thus, argues that Sheedy was under a duty to notify Rounthwaite that Sheedy had procured an interest adverse to Rounthwaite's when Sheedy determined through legal research that the will intended Rounthwaite to be a contingent remainderman and Sheedy to be alternate contingent remainderman to the trust. Also, she argues that Sheedy should be estopped therefore, from relying on the decree of distribution. Washburn is again attempting to impose a duty on Sheedy to provide notice of the final accounting and decree of distribution to Rounthwaite where one does not exist.

*Larrabee* involved an executor who led a party to believe that she would receive the property that her

mother would have received had she survived the testator. The executor determined before he filed the petition for distribution that he was erroneous in this belief but failed to notify the party that he had changed his position and intended to ask the court to distribute the property to himself. (*Larrabee, supra*, 21 Cal.2d at p. 650.)

> "The seminal definition of extrinsic fraud is found in *United States v. Throckmorton* (1878) 98 U.S. 61, 65-66 [25 L.Ed. 93, 95]: 'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. [Citations.]' " (*Estate of Sanders* (1985) 40 Cal.3d 607, 614.)

In the present case, there is no evidence that Sheedy indicated to Rounthwaite that her interest in the trust was vested, discouraged Rounthwaite from participating in the proceedings, or encouraged Rounthwaite to rely on her to provide Rounthwaite with a vested interest. As previously explained, Rounthwaite received adequate notice of the proceedings and could have protected her

interests. The record does not reveal that Sheedy did anything fraudulently to deprive Rounthwaite of the opportunity to protect her interests in the trust estate or violated any fiduciary duties to Rounthwaite.

## DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Dabney
J.

We concur:

/s/ Campbell
P.J.

/s/ Hollenhorst
J.

# APPENDIX B

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
SEP 15 1989
Court of Appeal Fourth Dist.

Estate of HELEN LOUISE GREAVES,
Deceased.

MARGOT M. WASHBURN, etc.
Petitioner and Appellant,
v.
JANE SHEEDY, etc.
Respondent.

E005898
(Super.Ct. Indio 3719)

## MODIFICATION OF OPINION

The opinion filed in this case on August 25, 1989, is modified as follows:

1. Page 3, line 11 the sentence reading "Rounthwaite also received notice of Sheedy's petition for payment" should be modified to read "Rounthwaite also received notice of Sheedy's petition for partial payment"

2. Page 8, line 4 reading "Washburn concedes that Rounthwaite received the notice" should be modified to read "Washburn concedes that Sheedy sent the notice"

3. Page 8, line 7 reading "satisfy due process requirements. Rounthwaite received notice of" should be modified to read "satisfy due process requirements. Sheedy sent notice of"

4. Page 9, lines 1, 2 and 3 reading "and attorney fees, but the record does not reveal that she received notice of any proceedings. Nor does the record indicate that she filed a request for special notice pursuant to" should be modified to read "and attorney fees to Rounthwaite, but the record does not reveal that Sheedy sent notice of any other proceedings to Rounthwaite. Nor does the record indicate that Rounthwaite filed a request for special notice pursuant to"

5. Page 10, line 14 reading "hearing in that proceeding. Since she did receive personal notice" should be modified to read "hearing in that proceeding. Since she was sent personal notice"

Except for the modifications hereinabove set forth, the opinion previously filed remains unchanged.

NOT FOR PUBLICATION

/s/ Dabney
J.

We concur:

/s/ Campbell
P.J.

/s/ Hollenhorst
J.

# APPENDIX C

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

**FILED**
SEP 15 1989
Court Of Appeal Fourth Dist.

Estate of HELEN LOUISE GREAVES, Deceased.
MARGOT M. WASHBURN, etc.,
Appellant
v.
JANE SHEEDY, etc.,
Respondent

E005898
Riverside County No. IP-3719

THE COURT:

The petition for rehearing is DENIED.

/s/ Campbell, P.J.
Presiding Justice

cc:
County Clerk, Riverside County Courthouse, P.O. Box 431, Riverside, CA 92502

Laurence L. Pillsbury
7730 Herschel Ave., Ste "C"
La Jolla, CA 92037

Russell J. Heinzelman
7100 Hayvenhurst, Ste 203
Van Nuys, CA 91406

Dillon, Boyd & Dougherty
193 South Civil Drive, Ste 6
Palm Springs, CA 92262

# APPENDIX D

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE
COURT OF APPEAL
FOURTH APPELLATE DISTRICT,
Division Two, No. E005898
S012340

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK



---

Estate of HELEN LOUISE GREAVES, Deceased

MARGOT M. WASHBURN, Appellant
v.
JANE SHEEDY, Respondent

---

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

# APPENDIX E

HEINZELMAN & SCHOENHERR
Attorneys at Law
7100 Hayvenhurst Av., Suite 203
Van Nuys, California 91406-3804
(818) 785-4225 (213) 873-3911

Attorneys for Trustee
JANE SHEEDY.

## SUPERIOR COURT OF CALIFORNIA
## COUNTY OF RIVERSIDE

Estate of
HELEN LOUISE GREAVES,
Decedent.

NO. INDIO 3719

DATE: June 10, 1988
TIME: 9:00 a.m.
PLACE: Palm Springs
Probate Court

**ORDER ON PETITION BY REMAINDERMAN'S SUCCESSOR TO DETERMINE TO WHOM THE TRUST ESTATE SHALL PASS ON DEATH OF INCOME BENEFICIARY.**

The verified petition of Margot M. Washburn, as personal representative of the Estate of Elizabeth

Whitman Rounthwaite, deceased, to determine to whom the trust estate shall pass on the death of income beneficiary, came on regularly for hearing by the court at 9:00 A.M. on June 10, 1988, in the courtroom of Palm Springs Probate Court, the Honorable Noah N. Jamin, Judge presiding. Petitioner appeared by counsel Laurence L. Pillsbury, and respondent, Jane Sheedy, Trustee, appeared by counsel Russell J. Heinzelman.

The court, having received and considered all of petitioner's moving papers and points and authorities, and all of respondent's responding papers and points and authorities, and having heard argument by both petitioner's and respondent's attorneys, finds from proof made to the satisfaction of the court:

Notice of the time and place of hearing has been duly given as required by law including to the heirs of the deceased and to those having requested special notice.

IT IS SO ORDERED:

1. That the determination as to whom the trust estate shall pass on the death of the income beneficiary is governed by the case of the Estate of E. W. Callnon (1969) 70 Cal. 2d 150, 74 Cal.Rptr. 250; and,

2. That the decree heretofore entered by this court is conclusive and that there is no ambiguity by reason thereof. The term "survivorship" in this case refers to the term of the trust.

DATED: July 28, 1988.

/s/ RD /s/ Moore

Judge of the Superior Court

# APPENDIX F

## STATUTORY PROVISIONS — THE CONSTITUTIONALITY OF WHICH MAY BE CALLED INTO QUESTION

"Immediately upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, devisee or legatee, or his assignee, grantee or successor in interest, and after notice given for the period and in the manner required by section 1200 of this code, the court must proceed to distribute the residue of the estate among the persons entitled thereto. Any person interested in the estate or any coexecutor or coadministrator may resist the application." Former Cal. Prob. Code § 1020, added 1931, as amended Cal. Stats. 1933, ch. 969, § 11, repealed Cal. Stats. 1988, ch. 1199, § 55.5.

"Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of filing a final account. Notice of such application must be given in the manner provided in Section 1200 of the Probate Code." Former Cal. Prob. Code § 1027, added Cal. Stats. 1933, ch. 908, § 1, as amended Cal. Stats. 1974, ch. 701, § 3, repealed Cal. Stats. 1988, ch. 1199, § 55.5.

"At least 10 days before the time set for the hearing of such petition, account or report, the petitioner or person filing the account or desiring the confirmation of a report of appraisers, must cause notice of the time and place of hearing thereof to be mailed to the executor or administrator, when he is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise

interested, addressed to them at their respective post-office addresses given in their requests for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person." Former Cal. Prob. Code, § 1200, as amended Cal. Stats. 1955, ch. 1133, § 9, repealed Cal. Stats. 1987, ch. 923, § 59, now § 1220 with material changes.